

69248-8

69248-8

No. 69248-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL THANH DONERY

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2019 MAR 22 PM 4:56

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SOHOMISH COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 4

D. ARGUMENT..... 10

1. Mr. Donery’s conviction must be reversed because the State did not prove beyond a reasonable doubt that his threats were based upon the correction officer’s race or that his threats were not protected by the First Amendment 10

 a. The State was required to prove every element of the crime of malicious harassment beyond a reasonable doubt..... 10

 b. The State did not prove that Mr. Donery threatened Deputy Sigh because of her race 12

 c. The State did not prove that Mr. Donery’s speech constituted a “true threat” and thus was not entitled to First Amendment protection 14

 d. Mr. Donery’s conviction must be dismissed 19

2. Mr. Donery’s conviction must be reversed because the jury instructions lessened the State’s burden of proving every element of the crime beyond a reasonable doubt..... 20

 a. Instruction 12 eliminated the requirement that the jury find Mr. Donery’s acts were malicious 21

 b. Instruction 11 reduced the State’s burden of proving Mr. Donery acted because of his perception of Deputy Sigh’s race ... 23

 c. Mr. Donery’s conviction must be reversed..... 25

E. CONCLUSION 27

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Nelson v. McClatchy Newspapers, Inc.</u> , 131 Wn.2d 523, 936 P.2d 1123, <u>cert. denied</u> , 522 U.S. 866 (1997).....	15
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	26, 27
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995)	20
<u>State v. Cronin</u> , 142 Wn.2d 568, 14 P.3d 752 (2000)	20
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	10
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1214 (2004).....	11, 15, 18, 20
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 717 (2000).....	22
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001)	20, 22
<u>State v. Talley</u> , 122 Wn.2d 192, 858 P.2d 217 (1993)	21, 23, 24, 25
<u>State v. Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	15

Washington Court of Appeals Decisions

<u>State v. Peters</u> , 163 Wn. App. 836, 261 P.3d 199 (2011).....	21, 22
<u>State v. Read</u> , 163 Wn. App. 853, 261 P.3d 207 (2011), <u>rev. denied</u> , 173 Wn.2d 1021, <u>cert. denied</u> , 133 S. Ct. 176 (2012)....	11, 12, 13, 16

United States Supreme Court Decisions

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	10, 20
---	--------

<u>Bose Corp. v. Consumers Union of U.S., Inc.</u> , 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).....	11
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	26
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	26
<u>New York Times Co. v. Sullivan</u> , 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).....	14
<u>Virginia v. Black</u> , 538 U.S. 343, 123 S. Ct. 1536, 152 L. Ed. 2d 535 (2003).....	14, 15
<u>Watts v. United States</u> , 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).....	15

United States Constitution

U.S. Const. amend. I.....	10, 11, 14, 15
U.S. Const. amend. VI.....	1, 2, 3, 10, 20
U.S. Const. amend. XIV.....	1, 2, 3, 10, 20

Washington Constitution

Const. art. 1, § 3.....	1, 2, 3, 10, 20
Const. art. 1, § 5.....	14
Const. art. 1, § 22.....	1, 2, 3, 10, 20

Washington Statute

RCW 9A.36.080(1)3, 11, 15, 16, 17, 21, 22, 23, 24

Washington Court Rule

RAP 2.5(a)..... 22

Snohomish County Code

Snohomish County Code § 5.10.010 17

Snohomish County Code § 5.16.010 17

Snohomish County Code § 5.16.020 18

Snohomish County Code § 5.16.030 18

Other Authority

Webster’s New World Dictionary of the American Language
(1968)..... 23

A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Mr. Donery committed malicious harassment.

2. Instruction 12 relieved the State of proving every element of the crime of malicious harassment. CP 85.

3. The trial court erred by refusing to give Mr. Donery's proposed instruction explaining the purpose of the malicious harassment statute. CP 91.

4. Instruction 9 lowered the State's burden of proving the mental elements of the crime of malicious harassment. CP 82.

5. The trial court erred by refusing to give Mr. Donery's proposed instruction defining the term "because of." CP 92.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Michael Thahn Donery was an inmate in a high security jail module, he was angry at a corrections officer who left him in a jail cell that was not sanitary, and he used racially-derogatory language and verbally threatened her. He was convicted of malicious harassment, but the State did not prove

beyond a reasonable doubt that he threatened the jail corrections officer because of her race, an essential element of the crime. Based upon an independent review of the critical facts of the case, must Mr. Donery's conviction be reversed and dismissed? (Assignment of Error 1)

2. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The malicious harassment statute outlaws only "true threats" where (1) a reasonable person of the hearer's race and in the position of the hearer would believe the threat was genuine and that the speaker had the ability to carry out the threat and (2) a reasonable person in the speaker's position would believe the threats would be perceived as serious. As an inmate in a high security jail module, Mr. Donery's freedom was greatly constricted and he had little or no ability to carry out any threat to harm a jail corrections officer. Based upon an independent review of the critical facts of the case, must Mr. Donery's conviction be dismissed because the State did not prove beyond a reasonable doubt that he made "true threats"? (Assignment of Error 1)

3. The due process clauses of the federal and state constitutions require the State to prove each element of a crime beyond a reasonable

doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The jury may not be instructed in a manner that reduces or eliminates this burden of proof. The malicious harassment statute requires the defendant to both intentionally and maliciously threaten a person because of the defendant's perception of the person's race or color. RCW 9A.36.080(1)(c). Instruction 12 incorrectly told the jury that the malicious harassment statute applies to defendants who "act with an intent to target a person because of that person's race or color." Did the instruction eliminate the requirement that the State prove beyond a reasonable doubt that Mr. Donery maliciously threatened a corrections officer because of her race in violation of due process? (Assignments of Error 2, 3).

4. The due process clauses of the federal and state constitutions require the State to prove each element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The jury may not be instructed in a manner that reduces or eliminates that burden. The malicious harassment statute requires the defendant to intentionally and maliciously threaten a person "because of" the defendant's perception of their race or color. RCW 9A.36.080(1)(c). Instruction 9 told the jury that the defendant's perception of the other

person's race or color "need not be the only or primary reason, but it must be proved to be a reason without which the defendant's acts would not have happened." Did the instruction lessen the State's burden of proving beyond a reasonable doubt that Mr. Donery maliciously threatened the corrections officer "because of" her race in violation of due process? (Assignments of Error 4, 5).

C. STATEMENT OF THE CASE

Michael Thahn Donery was charged with two counts of malicious harassment against a Snohomish County Jail corrections officer. CP 116, 120. A jury found Mr. Donery not guilty of malicious harassment for speech on March 8, 2012, and guilty of malicious harassment for speech on March 9, 2012. CP 68-69, 116.

Mr. Donery was incarcerated in a maximum security unit of the Snohomish County Jail where inmates are housed in single-person cells, not permitted any direct contact with other inmates, and only allowed out of their cells for one hour or less per day. 1RP 97, 100-01, 140; 2RP 45-46, 51; 3RP 114.¹ The metal cell doors have a window

¹ The verbatim report of proceedings contains five volumes. Four volumes will be referred to as follows:

1RP -- July 9 and July 10, 2012 (court reporter JoAnn Bowen)
2RP -- July 11, 2012 (Bowen)
3RP -- July 12 and August 23, 2013 (Bowen)
CR -- Closing argument, July 12, 2013 (Sharon L. Westling)

through which the inmate can be observed and a cuff slot through which inmates are given food or have handcuffs placed or removed; inmates can be easily heard through the door. 1RP 98-99. Inmates are allowed only a very limited amount of clothing, hygiene items, bedding, and books. 1RP 93-96, 139.

Jail inmates are allowed to use cleaning supplies but cannot accumulate them in their cells. 1RP 141. Custody Deputy Shari Sigh observed Mr. Donery wearing a vinyl glove and wiping down the wall of his cell. 1RP 144. Mr. Donery would not tell Deputy Sigh which corrections officer gave him the gloves, and she said he flushed the items down the toilet in his cell rather than give them to her. 1RP 92, 102, 145.

Deputy Sigh called her supervisor, and three officers removed Mr. Donery from his cell and searched him and the cell. 1RP 146-47; 2RP 128. Deputy Sigh placed Mr. Donery in a different cell with only the clothes he was wearing. 1RP 151. None of his personal items or blankets were transferred to the new cell, which contained only a mattress, bunk and desk. 1RP 149; 2RP 107, 119-20, 140.

The remaining volume will not be cited.

The new cell's toilet overflowed shortly after Mr. Donery was placed inside. 1RP 109. Inmate workers were called to clean the common area and corrections officers' office twice during Deputy Sigh's shift, but no one cleaned Mr. Donery's cell. 1RP 158-59; 2RP 138. Although she did not see Mr. Donery place anything in the toilet of the new cell, Deputy Sigh decided he was responsible for the flooding of his cell and refused to move him to a clean cell during her 4 PM to midnight shift.² 1RP 99, 109, 153, 156; 2RP 28. She opined toilet flooding only minimally impacts the inmates because the water can flow beneath the cell door. 2RP 23. She added that she did not see or smell any fecal matter in Mr. Donery's cell. 2RP 18.

Over the next hour and half, Mr. Donery yelled many racially-derogatory and threatening remarks concerning Deputy Sigh, who identified herself as black. 1RP 100, 110, 116-18. She overheard the remarks and wrote them down while sitting in her office. 1RP 110-11. Mr. Donery stopped yelling when Snohomish County Deputy Sheriff Marcus Dill, in the jail to interview another inmate, stopped to talk to him about what happened. 2RP 31, 103, 106., 131. Mr. Donery told the deputy that his cell was dirty and asked to see a supervisor; Deputy

² Only a supervisor can approve leaving an inmate in a cell without any personal items or blankets as a punitive sanction. 2RP 119-21.

Dill assured Mr. Donery it would be cleaned as soon as he calmed down. 2RP 107, 113, 114-15. Deputy Dill, however, did not tell the supervising sergeant about Mr. Donery's complaint or his request to speak to a sergeant. 2RP 121-22. No one investigated Mr. Donery's claim that he was left in an unsanitary cell for several hours. 3RP 56-57.

Flooding of cells by flushing items down the toilets was a recurring problem in the Snohomish County Jail, especially in the maximum security unit. 2RP 178, 143; 3RP 164. A county maintenance worker unclogged blockage on the toilets in Mr. Donery's unit on the morning of March 8, but the toilets continued to overflow after the water was turned back on. 2RP 172-73. They overflowed again during the evening, and on the morning of March 9 the maintenance worker discovered a blanket, blanket material, and rags in the main clean-out line between two cells. 2RP 173-75. The worker determined that two inmates other than Mr. Donery were responsible for the flooding. 2RP 177-78, 182. If the line is not obstructed, flushing the toilet will not cause it to overflow. 2RP 181.

It is against the jail rules to leave an inmate in a cell that has been flooded with waste water.³ 3RP 43, 44, 88-89. When Sergeant Bernard Moody went to investigate the situation during the next shift, he determined that Mr. Donery's complaint was justified, and he moved Donery to a clean cell. 3RP 165. Mr. Donery immediately calmed down when Sergeant Moody listened to his complaint. 3RP 166. Mr. Donery did not direct any racially-charged remarks towards the sergeant, who is African-American. 3RP 166, 169; CRP 15. In fact, Mr. Donery had never threatened or made offensive remarks to Sergeant Moody during any of their interactions in the jail. 3RP 169.

Deputy Sigh reported that Mr. Donery continued to shout racial epithets and threats during her shift the next day, March 9, 2012. 2RP 122. In addition to racially-derogatory words and comments, Mr. Donery said he would knock her out, terrorize her, and smash her. 1RP 126-27. He also said that knew people at the Department of Licensing and could get her license plate number and address. 1RP 127.

Corrections Deputy Chad Matthews also heard Mr. Donery complaining from his cell on March 9 about being left in "shit water" and making the racial comments and threats mentioned by Office Sigh.

³ Deputy Sigh did not agree this was a policy violation. 2RP 23.

3RP 77, 85. According to Deputy Matthews, Mr. Donery said he would get the first and last names of all of the corrections officers and announced he had custodial assaults on his record and had “stabbed a nigger in the fucking chest.” 2RP 77.

Corrections Sergeant John Bates walked through the unit that evening and heard Mr. Donery yelling. 3RP 31, 32-34. Sergeant Bates and Mr. Donery had a calm conversation, and Mr. Donery immediately told the sergeant that Deputy Sigh had left him in “shit water.” 3RP 36, 61. Sergeant Bates walked away, however, when Mr. Donery started making racially-derogatory remarks about Office Sigh. 3RP 36.

According to Sergeant Bates, Mr. Donery told him he would assault Deputy Sigh if Bates did not keep her away from him. 3RP 37, 63.

A classifications counselor who was in the unit for another reason also heard Mr. Donery yelling from his cell on March 9. She stopped to talk because she had good rapport with Mr. Donery and hoped to calm him down. 2RP 159-61. Mr. Donery related his complaint that Officer Sigh disrespected him by putting him in a cell with “shit water, and threatened to kill her because of what she had done. 2RP 161-62.

Deputy Sigh said that she felt terrorized and overwhelmed by Mr. Donery's threats even though he was in a maximum security jail cell. 1RP 128. She did not make any changes to her routine, but later asked that Mr. Donery be transferred to a different unit. 2RP 39, 46, 48. Deputy Sigh did not tell anyone on March 8 or March 9 that she was frightened. Those who observed her on March 8 described the corrections officer as calm and/or annoyed, and on March 9 a co-worker said she appeared upset and annoyed on March 9. 2RP 32-33, 115-16, 131; 3RP 83, 85-86.

D. ARGUMENT

1. Mr. Donery's conviction must be reversed because the State did not prove beyond a reasonable doubt that his threats were based upon the correction officer's race or that his threats were not protected by the First Amendment.

a. The State was required to prove every element of the crime of malicious harassment beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22. Because the

crime of malicious harassment implicates First Amendment rights, the appellate courts must conduct “an independent review of the whole record” to insure the conviction “does not constitute a forbidden intrusion on the field of free expression.” State v. Kilburn, 151 Wn.2d 36, 50, 52, 84 P.3d 1214 (2004) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). This involves independent review of the “crucial facts necessary to the legal determination of whether speech is protected.” Id. at 51.

Mr. Donery was convicted of one count of malicious harassment, RCW 9A.36.080(1)(c). CP 68-69, 116. The elements of the crime where are that Mr. Donery (1) maliciously and intentionally (2) threatened Deputy Sigh, (3) placed Deputy Sigh in reasonable fear of harm, and (4) threatened her “because of [his] perception of her race or color.” RCW 9A.36.080(1)(c); State v. Read, 163 Wn. App. 853, 864, 261 P.3d 207 (2011), rev. denied, 173 Wn.2d 1021, cert. denied, 133 S. Ct. 176 (2012); CP 86. An independent review of the critical facts of this case demonstrates that Mr. Donery did not threaten Deputy Sigh because of her race and that Mr. Donery’s threats were not “true threats” because Deputy Sigh’s fear was not reasonable, Mr. Donery

was not in a position to carry out the threats and Mr. Donery could not reasonable anticipate his threats would be taken seriously.

b. The State did not prove that Mr. Donery threatened Deputy Sigh because of her race. This Court upheld a malicious harassment conviction where the combination of the defendant's words and his aggressive and intimidating conduct proved that he intentionally and maliciously threatened another person because of her race. Read, 163 Wn. App. at 868. After leaving a restaurant with his wife, Read discovered he had been issued a parking ticket. Id. at 857. He drove to a restaurant valet and angrily complained about the ticket, and the valet directed him to the parking lot attendant. Id. Read then drove quickly up to the parking lot attendant, an Ethiopian woman, yelled at her, got out of his truck, and angrily advanced towards her with clenched fists, calling her a "fucking nigger" and a "fucking Ethiopian." Id. at 857, 858. The parking lot attendant was alone, much smaller than Read, and frightened. Id. at 857, 858. When she showed Read her cell phone and told him there were cameras nearby, Read said he did not care about the police, he knew where she lived. Id. at 858. The woman then ran and hid in the bushes to call 911; as she did so, she heard the defendant's car engine revving and the tires screeching in her direction.

Id. She then ran to safety, where she was crying and trembling for over 20 minutes. Id. at 860.

The Read Court concluded that this evidence was sufficient to establish beyond a reasonable doubt that Read threatened the parking attendant because of her race. Read, 163 Wn. App. at 867-68. The Court noted Read had not gotten out of his truck to confront the Caucasian valet and his anger “escalated” as soon as he saw the Ethiopian parking attendant. Id. at 868. Read’s racial epithets, aggressive manner, clenched fists, and coming toward the victim all demonstrated that the reason for his anger “switched” from anger over receiving a parking ticket to his perception of the parking attendant’s race. Id. at 868-69.

In contrast, Mr. Donery was angry with Deputy Sigh because she kept him in an unsanitary cell and refused to move him to a clean cell. His anger escalated when she left him in the dirty cell for the remainder of her shift, not because of her race. And, while Donery was angry and raised his voice, he did not make any aggressive physical gesture or movement; he only used words. Unlike Read, there was no combination of actions and words to support a finding that Mr. Donery’s speech was designed to threaten Deputy Sigh. Nor was there

evidence that Mr. Donery's anger escalated when he discovered the race of the person who had harmed him, and he did display anger at an African-American corrections officer who treated him fairly. Thus, the State did not prove beyond a reasonable doubt that Mr. Donery threatened Deputy Sigh because of her race.

c. The State did not prove that Mr. Donery's speech constituted a "true threat" and thus was not entitled to First Amendment protection.

The First Amendment protects the right of an individual to freely express himself in order to permit the free exchange of ideas necessary for a democracy, even if the ideas are distasteful or offensive.⁴ U.S. Const. amends. I, XIV; Virginia v. Black, 538 U.S. 343, 358, 123 S. Ct. 1536, 152 L. Ed. 2d 535 (2003); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (noting national commitment to permitting robust public debate that may include vehement and even sharp attacks). Article I, section 5 of the Washington Constitution similarly guarantees the right to freely

⁴ The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." The First Amendment is applicable to the states through the Fourteenth Amendment. Black, 538 U.S. at 358.

express ideas.⁵ The right to free speech is both a fundamental right and a key to ensuring the exercise of other constitutional rights. Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 535-36, 936 P.2d 1123, cert. denied, 522 U.S. 866 (1997).

Some speech, however, is exempt from First Amendment protections, including “true threats.”⁶ Black, 538 U.S. at 359; Watts v. United States, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969). Washington defines a “true threat” as “a statement made in a context or under circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” Kilburn, 151 Wn.2d at 43 (internal quotation marks omitted) (quoting State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001)).

In order to protect free speech, RCW 9A.36.080(1)(c) prohibits only true threats. The statute applies when a defendant:

Threatens a specific person or group of persons
and places that person, or members of the specific group

⁵ Article I, section 5 reads, “Every person may freely speak, write and publicly on all subjects, being responsible for the abuse of that right.”

⁶ The United States Supreme Court has not provided a definitive definition of the term “true threats,” but held they include “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Black, 538 U.S. at 359.

of persons, in reasonable fear of harm to person or property. The fear must be fear that a reasonable person would have under all the circumstances. For purposes of this section, a “reasonable person” is a reasonable person who is a member of the victim’s race, color, religion, ancestry, national origin, gender, or sexual orientation, or who has the same mental, physical, or sensory handicap as the victim. Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

RCW 9A.36.080(1)(c). Thus, “words alone cannot constitute malicious harassment ‘unless the context or circumstances surrounding the words indicate the words are a threat’ and it is apparent that the person can carry out the threat.” Read, 163 Wn. App. at 864 (quoting RCW 9A.36.080(1)(c)).

Mr. Donery was in a maximum security module in the Snohomish County Jail. He was under continuous surveillance, his access to any kind of property that could be used as a weapon was extremely limited, and he was subject to searches at any time. As a result of Mr. Donery’s unique position as a jail inmate, no reasonable black person in Deputy Sigh’s position would reasonably fear Mr. Donery’s threats.

Deputy Dill, for example, testified that he had been threatened as a corrections officer but had never taken the comments seriously enough to file a police report. 2RP 111, 123. He explained that jail interactions can be emotional, but he did not think anyone who threatened him would follow through. 2RP 123. Moreover, Deputy Singh herself appeared composed and only a little upset throughout the incident.

In addition, the malicious harassment statute specifically provides, “Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.” RCW 9A.36.080(1)(c). Mr. Donery did not have the ability to carry out any threats against the deputy from his jail cell. His comments that he knew people on the outside who could find her address were puffery, and there is no evidence that Mr. Donery had any friends or contacts whatsoever. Even if he did, his contact with them would be monitored by the jail staff to such an extent that threats against a corrections officer would be unlikely. Snohomish County Code §§ 5.10.010 (2) (requires continuance sight and/or sound surveillance of all prisoners); 5.10.010(4) (requires personal observations of every prisoner every 60 minutes or less); 5.16.010(4)

(telephone calls will be recorded and may be monitored); 5.16.020(2)(b) (incoming mail may be opened and inspected, outgoing mail may be inspected if cause to believe it poses threat to penological interests); 5.16.020(3) (all packages inspected); 5.16.030(4) (visitors subject to search, may be refused entrance).

The critical facts also show that a reasonable person in Mr. Donery's position would not believe his threats would be taken seriously. The Kilburn Court reversed a felony harassment conviction because an independent review of the record showed the defendant's speech was not a "true threat" because a reasonable person in the defendant's position would not foresee his comments would be taken as a serious threat. Kilburn, 151 Wn.2d at 53. Kilburn was a student who commented to a fellow student, K.J., that he was going to bring a gun to school the next day and shoot everyone, starting with her. Id. at 39.

K.J. thought Kilburn was joking and he had never said anything like that before. Id. Noting that Kilburn regularly joked with K.J. and other students and that he giggled and laughed when he made the statement, the Supreme Court concluded a reasonable person in Kilburn's position would not have believed his statement would be taken as a serious threat. Id. at 53. The conviction was therefore

reversed. Id. at 54. Similarly, a reasonable person in Mr. Donery's position would not believe that Deputy Sigh would take his threats seriously because of his powerless position as a maximum security prisoner and because of the emotional language that is commonly used in a jail setting.

An independent review of the critical facts of this case thus shows that Mr. Donery's threats to the corrections officer were not "true threats."

d. Mr. Donery's conviction must be dismissed. Mr. Donery was angry because Deputy Sigh kept him in an unsanitary jail cell and he was not removed until the supervisor of the next shift discovered the problem. An independent review of the critical facts show that Mr. Donery's threats against Deputy Sigh, while laced with unsavory racial epithets, were not made because she was black, but because of her actions. Thus, the State did not prove beyond a reasonable doubt that Mr. Donery threatened the corrections officer because of his perception of her race.

In addition, other critical facts show that Mr. Donery was a highly-controlled inmate of a county jail with no real ability to harm Deputy Sigh. The State thus did not prove beyond a reasonable doubt

that Mr. Donery's threats were "true threats" because (1) no reasonable person in the correction officer's position would believe Mr. Donery's threats were serious, (2) it was apparent to Deputy Sigh that Mr. Donery did not have the ability to carry out his threats, and (3) no reasonable person in Mr. Donery's position would believe the threats would be taken seriously. Mr. Donery's malicious harassment conviction must be reversed and dismissed. See, Kilburn, 151 Wn.2d at 54.

2. Mr. Donery's conviction must be reversed because the jury instructions lessened the State's burden of proving every element of the crime beyond a reasonable doubt.

A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Apprendi, 530 U.S. at 300-01. The jury must therefore be instructed that it must find every element of the charged offense in order to convict the defendant. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). It is reversible error to instruct the jury in a manner that relieves the State of its high burden of proof. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000); State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995). This court reviews

instructions de novo. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011).

a. Instruction 12 eliminated the requirement that the jury find Mr. Donery's acts were malicious. In order to convict a defendant of malicious harassment, the State must prove he acted both intentionally and maliciously. RCW 9A.36.080(1). Instruction 12, however, told the jury the statute outlawed acting with the intent to target a person due to race without including the maliciousness element.⁷ CP 85.

The malicious harassment statute withstood several challenges to its constitutionality in State v. Talley, 122 Wn.2d 192, 858 P.2d 217 (1993). Based upon language in Talley, Mr. Donery proposed a jury instruction that stated:

The intent of the malicious harassment statute is not to punish bigoted speech or thought, but rather th[e] act of victim selection.

CP 91 (citing Talley, 122 Wn.2d at 206 (“RCW 9A.36.080(1) concerns not bigoted speech or thought, but rather the act of victim selection.”)). The trial court declined to give Mr. Donery’s proposed instruction, but reworked the instruction and gave Instruction 12, which read:

⁷ Copies of Instruction 12 and Mr. Donery’s proposed instruction are attached as Appendix A.

The malicious harassment statute punishes not bigoted speech or thought, but rather those defendants who act with an intent to target a person because of that person's race or color.

CP 85.

Mr. Donery objected to the court's instruction and the court's failure to give his proposed instruction, arguing that the proposed instruction was more clear and understandable. 3RP 157-58, 180-81. While defense counsel did not argue the instruction omitted an essential element of the crime, whether jury instructions reduce or eliminate the government's burden of proof is an issue of constitutional magnitude that may be raised for the first time on appeal. RAP 2.5(a); Stein 144 Wn.2d at 240-41; State v. Roberts, 142 Wn.2d 471, 500-01, 14 P.3d 717 (2000) (and cases cited therein); Peters, 163 Wn. App. at 847.

Instruction 12 reduces the State's burden of proof by eliminating one of the mental elements of malicious harassment. The statute requires the defendant act both intentionally and maliciously in threatening a person because of race or other factors. RCW 9A.36.180(1). By informing the jury that it was illegal to act only with intent to target another person based upon race, the instruction eliminates the State's burden to show the defendant also acted maliciously.

b. Instruction 11 reduced the State's burden of proving Mr. Donery acted because of his perception of Deputy Sigh's race. RCW 9A.36.080(1) requires the State to prove that the defendant acted maliciously and intentionally "because of his or her perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical or sensory handicap." The "because of" language is included in the "to convict" instruction. CP 86. The court also instructed the jury that the malicious harassment statute punishes "those defendants who act with an intent to target a person because of that person's race or color" rather than bigoted thought or speech. CP 85. The Talley Court interpreted the phrase "because of" to mean "by reason of" or "on account of."⁸ Talley, 122 Wn.2d at 213 (citing Webster's New World Dictionary of the American Language 131 (1968)) Mr. Donery therefore requested that the jury be instructed that, "Because of means 'by reason of' or 'on account of.'" CP 92.

The trial court instead gave Instruction 11, which included Mr. Donery's proposed instruction but added an additional paragraph informing the jury that perception of race need only be one of multiple

⁸ The court concluded, "When read as a whole, this language is clear and provides adequate notice that the prohibited conduct is the selection of crime victims from certain specified categories." Talley, 122 Wn.2d at 213.

reasons for the defendant's actions.⁹ CP 82. The court's instruction reads:

“Because of” means “by reason of”.

There may be multiple reasons for a defendant's acts. The defendant's perception of the other person's race or color need not be the only or primary reason, but it must be proved to be a reason without which the defendant's acts would not have happened.

CP 82. Mr. Donery excepted to this instruction and the court's failure to give the simple instruction he proposed. 3RP 179-81; see 3RP 146-50, 153-57. Defense counsel argued the instruction invaded the province of the jury and over-emphasized bigoted speech. 3RP 148, 156-57, 180.

The malicious harassment statute outlaws maliciously and intentionally threatening another person “because of [the defendant's] perception of the victim's race, color, religion, ancestry national origin, gender, sexual orientation, or mental, physical, or sensory handicap.” RCW 9A.36.080(1). The term “because of” is commonly understood to mean “by reason of” or “on account of,” and the statute is clear. Talley, 122 Wn.2d at 213. There was no need for the court to include an additional explanation of the meaning of the statute beyond the

⁹ Copies of Instruction 9 and the defendant's proposed instruction are also attached as Appendix B.

simple definition proposed by Mr. Donery.¹⁰ In fact, the language added by the court confused the jury, which asked the court to explain the language of the added paragraph. CP 70.

Here, the trial court told the jury how to interpret the words “because of” by saying that the defendant’s perception of Ms. Sigh’s race need not be the primary reason for his actions, “but it must be proved to be a reason without which the defendant acts would not have happened.” CP 82. This is inconsistent with the Talley Court’s explanation that the malicious harassment requires the targeting of a victim. Talley, 122 Wn.2d at 201, 206, 209. “[T]he State must prove that the defendant selected a victim because of perceived membership in a specific group.” Id. at 209. The court’s instruction, however, lessened the State’s burden by permitting the jury to convict Mr. Donery if it only found that that one of the reasons he selected the victim was his perception of her race.

c. Mr. Donery’s conviction must be reversed. A constitutional error is presumed prejudicial unless the government can demonstrate “beyond a reasonable doubt that the error complained of did not

¹⁰ The court must define words in a statute if they have a technical meaning that differs from common usage but need not define other terms. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

contribute to the verdict.” Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). When an element in a jury instruction is omitted or misstated, the error is harmless only if the element is supported by uncontroverted evidence. Neder, 527 U.S. at 18; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The appellate court must thoroughly examine the record and may only affirm the conviction if the court determines the jury verdict would have been the same absent the error. Brown, 147 Wn.2d at 341.

Mr. Donery’s defense was that he was complaining about Ms. Sigh because she improperly left him in an unsanitary jail cell for several hours with only a mattress and the clothing he was wearing. Several witnesses testified this was inhumane. The evidence supporting Mr. Donery’s claim was so powerful that he was acquitted malicious harassment for conduct that occurred on the evening he was left in the unclean cell. CP 69, 116.

In addition, the jury asked the judge to explain the instruction at issue, demonstrating that this concept was critical to their deliberations.

This Court cannot conclude beyond a reasonable doubt that Mr. Donery would have been convicted if the jury had been correctly

instructed as to the elements of malicious harassment. Mr. Donery's conviction must be reversed and remanded for a new trial. Brown, 147 Wn.2d at 344.

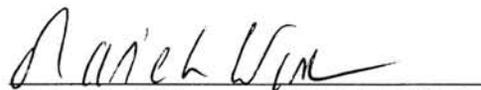
E. CONCLUSION

Michael Thahn Donery's conviction for malicious harassment must be reversed and dismissed because an independent review of the critical facts shows that the State did not prove beyond a reasonable doubt that (1) Mr. Donery threatened the jail corrections officer because of his perception of her race and (2) Mr. Donery's words were a true threat.

In the alternative, his conviction must be reversed and remanded for a new trial because two of the jury instructions reduced the State's burden of proving every element of malicious harassment beyond a reasonable doubt.

DATED this 22nd of March 2013.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

APPENDIX A

**Jury Instruction 12 and
Corresponding Instruction Proposed by Defense**

INSTRUCTION NO. 12

The malicious harassment statute punishes not bigoted speech or thought, but rather those defendants who act with an intent to target a person because of that person's race or color.

Instruction No. _____

The intent of the malicious harassment statute is not to punish bigoted speech or thought, but rather that act of victim selection.

Defendant's Proposed Jury Instruction No. _____

State v. Talley, 122 Wn.2d 192, 206 (1993).

APPENDIX B

**Jury Instruction 9 and
Corresponding Instruction Proposed by Defense**

INSTRUCTION NO. 9

"Because of" means "by reason of".

There may be multiple reasons for a defendant's acts. The defendant's perception of the person's race or color need not be the only or primary reason, but it must be proved to be a reason without which the defendant's acts would not have happened.

Instruction No. 8

"Because of" means "by reason of" or "on account of."

Defendant's Proposed Jury Instruction No. _____

State v. Read, 163 Wn.App. 853, 865-66 (2011).

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69248-8-I
)	
MICHAEL DONERY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF MARCH, 2013.

X _____ 